Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Cheng v. The Owners, Strata Plan EPS2669,* 2021 BCCRT 202

B E T W E E N :

MAN HUNG RICHARD CHENG and VIRGINIA YI HUNG TAM

APPLICANTS

A N D :

The Owners, Strata Plan EPS2669

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. This dispute is about fines for alleged bylaw contraventions by strata lot tenants. The applicants, Man Hung Richard Cheng and Virginia Yi Hung Tam (owners), own strata lot 462 (SL462), known as unit #308, in the respondent strata corporation, The Owners, Strata Plan EPS2669 (strata). In the first months of 2020, the strata fined the tenants of SL462 (tenants) multiple times for allegedly breaking a strata bylaw by

creating unreasonable noise. The strata charged those fines to the owners' strata lot account.

2. The owners say their tenants did not create unreasonable noise, and the strata did not adequately investigate the noise complaints or hold a hearing with the owners about the fines. The owners request an order for the strata to cancel $1,200 in tenant noise bylaw fines from their strata lot account. They also claim $6,750 for lost rental income because they say the bylaw fines caused the tenants to leave before the end of their lease.

3. The strata says it properly investigated the noise complaints and followed the notice and hearing requirements of the *Strata Property Act* (SPA). The strata says it properly imposed the fines and charged them to the owners' account. It also says that it is not liable for lost rental income, because it resulted from the owners' and tenants' voluntary agreement to end the lease early.

4. Mr. Cheng represents the owners in this dispute. A strata council member represents the strata. The former SL462 tenants are not named as parties to this dispute.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the Civil Resolution Tribunal Act (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

6. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

7. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

8. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

ISSUES

9. The issues in this dispute are:

    a. Whether the strata properly imposed the bylaw fines on the tenants, and if not, must the strata remove the fine amounts from the owners' strata lot account?

    b. Whether the strata is liable to the owners for lost rental income, and if so, for how much?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicant owners must prove their claims on a balance of probabilities. I have read and weighed all the parties' evidence and submissions, but I refer only to that which I find necessary to explain my decision.

11. The strata was formed under the SPA in June 2015. The strata's initial bylaws were the SPA's standard bylaws with some modifications. The strata subsequently amended its bylaws several more times. The only change from the standard bylaws relevant to this dispute is the January 23, 2017 amendment to bylaw 23 that sets out a maximum fine of $200 for each bylaw contravention.

12. The disputed fines were issued under bylaw 3(1). That bylaw says, in part, that an owner or tenant must not use a strata lot in a way that causes a nuisance or hazard

to another person, causes unreasonable noise, or unreasonably interferes with the rights of other persons to use and enjoy another strata lot.

13. It is undisputed that on November 13, 2019, the tenants began a 1 year and 2 day fixed-term lease of SL462. In December 2019, the occupants (complainants) of a strata lot on the floor below the tenants began to complain about excessive nighttime noise. The complainants said this yelling, running, and door-slamming noise was coming from SL462. The owners say the tenants did not make any excessive noise, and after learning of the initial noise complaints, took great pains to muffle any sounds in their unit. This is consistent with photos in evidence showing padding applied to door strike plates and door stoppers. On the evidence before me, I find the complainants are the only people who complained about SL462 noise during the tenants' tenancy.

14. As further discussed below, the strata fined the tenants $200 in January 2020 under bylaw 3(1). The strata then considered the owners' and tenants' written comments about that noise complaint but did not hold a hearing. In late February 2020, the strata told the tenants and owners that it would not reverse the fine.

15. The strata issued several more $200 fines for noise in March 2020 and April 2020. After an April 29, 2020 hearing, the strata council refused to reverse those additional fines. However, the strata council reduced the amount of those fines from around $4,000 to $1,000, on the condition that no further noise complaints were received. The tenants were the sole occupants of SL462 from January 2020 through April 2020.

16. In a "Mutual Agreement to End a Tenancy" dated May 3, 2020, the tenants and owners agreed to end the tenancy on May 31, 2020, with no further obligations to each other. It is undisputed that the tenants moved out on May 31, 2020 and returned their keys and key fobs. Email evidence shows that the complainants continued to complain of similar excessive nighttime noise from SL462 on June 1, 2020 and June 6, 2020, although key fob records show that the tenants' fobs were not used to enter the building after May 31, 2020. The owners say they were unable to re-rent the strata lot until September 1, 2020, and had to charge lower rent to do so.

Did the strata properly impose the bylaw fines on the tenants?

17. It is undisputed that the tenants, and not the owners, allegedly created the noise that led to the bylaw fines at issue here. So, I find that only the tenants could have violated bylaw 3(1) for unreasonable noise. The tenants and owners received essentially identical strata notices about each fine. I find none of the fine notices explicitly said whether the owners or tenants were fined, although they all said a $200 fine would be charged to "your account" for the infraction.

18. I find the first fine notice, dated January 28, 2020, said that noise had recently emanated from unit #308. I find this was during a time when the tenants were the sole occupants. The other fine notices all say that residents "associated with" unit #308, whom I find are the tenants, created the offending noise. On balance, I find all the fines were issued to the tenants, not the owners. Further, and regardless of whether the bylaw fines were issued to the tenants or the owners, I find that all of the bylaw fines were improperly issued and are invalid, for the reasons below.

19. First, even if I had found that the fines were issued against the owners, I find that SPA section 130 requires the strata to fine tenants, and not owners, for tenants' bylaw contraventions (see *Clark v. The Owners, Strata Plan BCS 2785*, 2017 BCCRT 49 and *Wong et al v. The Owners, Strata Plan LMS 1178*, 2019 BCCRT 1088, which I find are persuasive). The fines at issue here relate only to alleged tenant violations of bylaw 3(1), so I find that the owners cannot be fined for those violations. So, if these bylaw fines were issued to the owners, I find they are invalid. However, I note that under SPA section 131, the strata may collect tenants' bylaw fines from the strata lot owners, and the owners may then seek reimbursement from the tenants. I find that is likely what happened here, given that all the fines were charged to the owners' strata lot account.

20. Turning to the tenants' bylaw fines, I find that the strata did not give the tenants a reasonable opportunity to respond to each noise complaint and to request a hearing before issuing each fine, as required by SPA section 135(1)(e). My reasons follow.

21. In *The Owners, Strata Plan NW3075 v. Stevens*, 2018 BCPC 2 at paragraph 48, the court said that the persons who may be subject to a bylaw fine must be given a reasonable opportunity to answer the complaint, including requesting a hearing. In this case, I find those persons are the tenants. *Stevens* also confirmed that under section 135(1)(f), the strata must notify owners of complaints about tenants. In *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449 at paragraphs 27 and 28, the court confirmed that the strata must strictly follow the requirements of section 135 **before** it can impose a fine.

22. The strata sent a noise complaint warning letter to the owners dated December 12, 2019, which the owners forwarded to the tenants. The letter said that alleged tenant noise contravened the strata's bylaws, and if further complaints were received, a $200 fine would be charged to the owners' strata lot account. The letter quoted bylaw 3(1) subsections (a) to (c). I find the December 12, 2019 letter was not notice that a fine was being considered for that alleged violation, but was simply a warning letter.

23. January 28, 2020 strata letters addressed to the "Current Resident" and the owners said that further noise complaints had been received in contravention of the strata bylaws, and that a "fine of $200 will be charged to your account for this Bylaw infraction", again quoting bylaw 3(1). The particulars of the complaint and the $200 fine were in italics. In non-italicized text at the bottom of the letter, the strata said "you" had an opportunity to answer the complaint in writing and/or to request a hearing within 14 days, and that the owners' strata lot account might be fined $200 for each bylaw infraction.

24. All of the subsequent bylaw fine letters sent to the tenants and owners followed the same pattern, with the particulars of each complaint and the $200 fine specified in italics, and the opportunity to respond before a fine was applied set out in identical, non-italicized text. Having reviewed all of the fine letters, I find that they each indicated that bylaw 3(1) had been breached, and imposed a $200 fine on the tenants, charging it to the owners' strata lot account. The strata does not explain, and I find there is no clear reason, why the fine letters said there was an opportunity to respond

to the complaint and request a hearing before a $200 fine might be applied, when the same letters said the strata had already found there was a bylaw infraction and had imposed a fine. I find there was no opportunity to respond before each fine was imposed, because the notice letters themselves imposed the fines. On balance, I find the identical paragraphs saying there was an opportunity to respond before a fine was applied are likely copied "boilerplate" that the strata did not intend to apply to these fines.

25. Further, a February 26, 2020 email from the strata's property management company to the tenants said that the strata council had decided that the noise complaint described in the January 28, 2020 letter was valid, and so "the fines will stay." I find this is evidence that the strata had already fined the tenants on January 28, 2020, before they had an opportunity to respond or request a hearing, and before the owners were notified about that complaint as required under SPA section 135(1)(f).

26. Similarly, in a May 5, 2020 letter following the April 29, 2020 hearing, the strata told the owners that it had decided to reduce the "possible" fines issued in March 2020 and April 2020. The letter said those fines would be reduced from $4,000 to $1,000 if the tenants stopped making excessive noise and the complainants submitted no more complaints. In a June 9, 2020 letter, the strata re-confirmed that it had decided to "reduce the fine to $1,000" if no more noise complaints were received, which it did. On balance, I find this evidence is consistent with the strata levying $200 bylaw fines against the tenants in each violation letter, and later deciding to reduce the amount of each fine.

27. The strata suggests that some or all of the fines issued after January 28, 2020 were for "continuing contraventions" of bylaw 3(1). I find the strata essentially says that under SPA section 135(3), the strata did not have to comply with the section 135 notice and response requirements for any continuing contraventions. I find none of the noise complaints and fines are continuing contraventions, based on the binding decision *The Owners v. Grabarczyk*, 2006 BCSC 1960 at paragraph 43, appeal dismissed 2007 BCCA 295. The court in *Grabarczyk* indicated that noise violations

are not continuous or continuing contraventions when observed on different dates. Noise violations are distinct contraventions for which a fine may be imposed only if the section 135 requirements are met for each contravention.

28. The strata says it notified the owners and tenants about the fines, and that the strata council investigated the complaints and considered the tenants' and owners' responses before charging the fines to the owners' strata lot account. Having reviewed the evidence, I find that the strata chose to delay its collection of several tenants' fines from the owners' strata lot account until after the April 29, 2020 hearing. I find this was only a delay in collection, not a delay in the imposition of the fines. I find that each tenant fine was imposed by each bylaw contravention letter. I find there was no opportunity for the tenants to answer each noise complaint, and that the owners were not notified about each complaint, before each applicable fine was imposed. I find this breached SPA sections 135(1)(e) and (f).

29. A strata corporation can cure a SPA section 135(1) procedural breach if it reverses the bylaw fine and provides new notices to the applicable tenants and owners (see *Cheung v. Strata Plan VR 1902*, 2004 BCSC 1750). In this case, I find that the reduction in the total amount of the alleged March 2020 and April 2020 bylaw fines from approximately $4,000 to $1,000 was not a fine reversal, but a change in the amount of each fine. I find the strata did not reverse any of the tenant bylaw fines or the resulting charges to the owners' strata lot account, or issue new notices. So, I find the strata has not cured its section 135(1) breaches.

30. On the evidence before me, I find that each of the $200 bylaw fines issued to the tenants in the period from January 2020 to June 2020 breached SPA section 135(1). I find the strata did not cure any of those breaches by reversing fines and issuing new notices. So, I find that all of the tenant bylaw fines at issue are invalid.

31. Specifically, I find that all of the bylaw 3(1) fines the strata issued for alleged tenant noise from January 2020 through June 2020 are invalid. This includes all bylaw fines that are the subject of notices issued to the tenants, owners, or residents of SL462 dated January 28, 2020, February 28, 2020, March 13, 2020, April 1, 3, 17, 21, 23,

and 24, 2020, May 5, 2020, and June 9, 2020. Although the parties provided arguments and evidence about whether the tenants actually created excessive noise, I find it is not necessary to determine whether the tenants did so, because the fines were invalidly issued under section 135(1).

32. Given that these bylaw fines were invalid, the strata had no basis for collecting them from the owners. The strata does not deny that the bylaw fines charged to the owners' strata lot account total $1,200. Therefore, I order the strata to remove the $1,200 in invalid bylaw fines from the owners' strata lot account.

Is the strata liable for the owners' lost rental income?

33. The owners say that the noise complaints and bylaw fines against the tenants made the tenants uncomfortable living in the strata, and they wanted to move. I find this is supported by the email correspondence in evidence, in which the tenants indicate that their efforts to minimize the noise in SL462 had not reduced the frequency of noise complaints. As noted, the owners and tenants agreed to end the tenancy on May 31, 2020 with no further obligations. This was about 5.5 months before the end of the original, fixed-term lease.

34. The owners say they had difficulty re-renting SL462, and that it sat empty until September 2020, after which they leased it for less rent than the tenants had been paying. The owners say that they lost $6,750 in rental income during the remaining term of the original lease. The owners say that the strata failed to fulfill its statutory duty to properly investigate the noise complaints before levying bylaw fines, so the strata is to blame for the tenants moving out, and owes the owners $6,750.

35. I find the owners have not met their burden of proving that they suffered the alleged rental income losses, for the following reasons. The owners say the tenants chose to move out, and the tenants paid none of their bylaw fines. However, it is undisputed that the owners agreed to let the tenants end the lease early, without further consequences. I find the owners did not have to agree to end the lease early. I find that if the tenants had broken the lease and moved out on May 31, 2020, the lease

said that the tenants were responsible for rental income losses in the event SL462 could not be re-rented for the same price. Given that the owners voluntarily chose to release the tenants from their responsibilities under the fixed-term lease, I find the owners are responsible for any rental income loss resulting from this early end to the lease, not the strata.

36. Further, the owners' evidence shows that many prospective tenants inquired about renting SL462 after May 31, 2020. The owners do not say whether or why any of these possible tenants were unacceptable. I find the evidence fails to show whether any of the possible tenants ultimately turned down the owners' rental offer after their inquiries, or why. On balance, I find that the owners failed in their duty to mitigate their rental income losses by reasonably re-renting their strata lot. I find the strata is not responsible for the owners' failure to re-rent SL462.

37. Even if the owners had proven a rental income loss that they had not failed to mitigate, I find the strata is not responsible for that loss, as follows.

38. The owners say the strata council members failed to act honestly and in good faith, keeping in mind the best interests of the strata corporation, and exercising the care, diligence and skill of a reasonably prudent person in comparable circumstances. This language mirrors SPA section 31. However, the section 31 requirements apply only to individual council members, rather than to the strata council or the strata as a whole. Further, the court in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 said strata council member duties under SPA section 31 are owed to the strata corporation, and not to individual owners. This means the owners lack standing, and cannot succeed, in a claim against the strata or individual strata council members for a breach of section 31. This court decision is binding on the CRT, so I would dismiss the owners' claim for a SPA section 31 remedy.

39. The owners also say that the strata council should have investigated the noise complaints more thoroughly, read all of the relevant emails, considered all of the audio-visual evidence, and carefully weighed the evidence before coming to a decision on the complaints. I find the owners say that the strata was unreasonably

careless in investigating the complaints and issuing the fines, which allegedly caused rental income losses.

40. SPA section 26 says that the strata, through its strata council, must enforce the strata's bylaws. *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148 at paragraph 52, says that the strata may investigate bylaw contravention complaints as it sees fit, if it complies with the principles of procedural fairness and is not significantly unfair to any person who appears before it. According to *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at paragraph 61, perfection is not required of the strata council, only reasonable action and fair regard for the interests of all concerned. I find the strata corporation will meet its section 26 obligations if it acts reasonably. (See also *LeBlanc v. The Owners, Strata Plan LMS 600*, 2020 BCCRT 783 at paragraphs 34 and 35, and *Chau v. The Owners, Strata Plan NW 155*, 2020 BCCRT 1161 at paragraphs 21 and 22. Although these CRT decisions are not binding on me, I find them persuasive.)

41. So, did the strata reasonably investigate the complaints and issue the fines? As noted, the bylaw fines were invalid because they failed to meet the procedural requirements of SPA section 135. I note that all of the fine notices were issued with the assistance of a professional strata management company. On the evidence before me, I find that although the strata's failures to meet the section 135 requirements were mistakes, the failures were not unreasonable or negligent in the circumstances.

42. Turning to the question of whether the strata's noise complaint investigations were reasonable, the strata says the strata council considered all of the audio-visual evidence that the owners allege they ignored, and that council members attended the complainants' strata lot in person to listen to the noise. The strata says it did not need to engage an independent third party to determine the source of the noise, contrary to the owners' request. I find the evidence does not show that the strata failed to consider applicable evidence, or needed to engage a third party.

43. As noted above, the complainants continued to complain of similar excessive noise from SL462 in the days after the tenants moved out and their key fobs were no longer in use. However, on balance, I find that before the tenants moved out, the strata council's evidence review and noise investigations were reasonable in the circumstances, and satisfied the SPA section 26 duty. This led the strata to decide that the tenants of SL462 made unreasonable noise, although I make no finding about whether this conclusion was correct.

44. I dismiss the owners' claim for lost rental income.

CRT FEES AND EXPENSES

45. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the owners were substantially successful, because they needed to bring this CRT dispute to a hearing in order to successfully remove the invalid bylaw fines from their strata lot account. So, I order the strata to reimburse the owners for $225 in CRT fees. Neither party claimed dispute-related expenses.

46. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owners.

ORDERS

47. I order that within 14 days of the date of this order:

    a. The strata remove $1,200 in charges from the owners' strata lot account for all bylaw 3(1) fines dated January 2020 through June 2020, and

    b. The strata pay the owners $225 for CRT fees.

48. I dismiss the owners' remaining claims.

49. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Chad McCarthy, Tribunal Member